SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 620

BENNIE DANIELS AND LLOYD RAY DANIELS,
Petitioners,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the United States District Court for the Eastern District of North Carolina, Raleigh Division, is reported at 99 F. Supp. 208, *sub. nom. Daniels v. Crawford;* [1] the opinion of the Court of Appeals for the Fourth Circuit together with the dissent of Judge SOPER are reported at 192 F. 2d 763.

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[1] By order of the Court of Appeals for the Fourth Circuit dated October 13, 1951, Robert A. Allen, the successor to J. B. Crawford as Warden of Central Prison of the State of North Carolina, was substituted as appellee.

Jurisdiction

The judgment of the Court of Appeals, affirming the order and judgment of the District Court which vacated the writ of habeas corpus theretofore issued by said District Court, dismissed the petition of petitioners for such writ of habeas corpus, and remanded petitioners to the custody of respondent, the Warden of the Central Prison of the State of North Carolina, wherein petitioners are inmates of the death house, under sentence of death by asphyxiation, petitioners having previously been indicted, tried and convicted without recommendation of mercy by juries of the Superior Court, Pitt County, North Carolina for the charge of murder in the first degree, was made and entered on November 5, 1951 (R. 341). Petition for writ of certiorari from this Court to the Court of Appeals was thereafter timely made and certiorari was granted by order of this Court on March 10, 1952 (R. 342) (342 U.S. 941).

The jurisdiction of this Court is conferred by § 1254(1) of Title 28 of the United States Code.

Statutes Involved

1. § 2241, Title 28, United States Code:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States."

2. § 2254, Title 28, United States Code:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.".

Statement of the Matter Involved

William Benjamin O'Neal, a taxicab driver, was murdered some time late Saturday night, February 5, 1949. His body was found in a mutilated condition, due to many knife wounds and heavy blows, several feet from his taxicab. The scene of the crime was near a tobacco barn on a dark, deserted road several miles from Greenville, Pitt County. The body of O'Neal, a white man, was first found before noon of February 6th. Between 1:00 and 1:30 a.m. of February 7th, the petitioner Lloyd Ray Daniels, a 17-year-old illiterate Negro, was arrested by six white police officers and then in the company of three of those officers he was taken to and placed in a jail cell in Williamston, Martin County, 30 miles from Greenville. At some time between 5 and 6 a.m. on the morning of February 8th, the petitioner Bennie Daniels, also a teen-age illiterate Negro, was arrested by four white men and taken by them to the same jail. An indictment charging petitioners with the wilful and premeditated murder of William Benjamin O'Neal was returned by the March Term, 1949, of the Grand Jury of Pitt County, comprised of 18 persons, none of them Negroes (R. 33-4, 315-6).

At the time petitioners were arraigned after indictment before the Superior Court of Pitt County, counsel was ap-

pointed for them. Petitioners pleaded to the charge but their trial was continued to the next succeeding Term as the petitioners were committed to the State Hospital for Insane Negro persons for the purpose of examining into their mental condition. Thereafter petitioners obtained their own counsel to replace court-appointed counsel and on March 24, 1949, the Superintendent of the aforesaid Hospital reported that petitioners had sufficient intelligence to distinguish right from wrong.

On the calling of the case for trial at the May 30th Term, 1949, of the Superior Court of Pitt County, the petitioners moved to quash the indictment and challenge to the array of petit jurors on the grounds that Negroes had been systematically and arbitrarily excluded from the grand and petit juries of Pitt County, solely for reasons of race or color, thereby depriving petitioners of the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution (R. 303). A hearing was held before the Honorable CLAWSON L. WILLIAMS, Judge Presiding, prior to the selection of the petit jury, upon the aforesaid motion and evidence was presented by petitioners and by the State. At the conclusion of the hearing the motion to quash the indictment and the challenge to the array were both denied (R. 303-320). Thereafter a petit jury was impanelled, which jury included one Negro.

At the trial the State offered in evidence alleged oral and signed confessions by petitioners that they had murdered O'Neal (R. 273-6). Upon timely objection by counsel for petitioners, the trial judge held a hearing without the presence of the petit jury on the question of the admissibility of the alleged confessions and determined them to be voluntary and, therefore, competent and admissible (R. 272). The State introduced in evidence the alleged confessions of the petitioners and other evidence intended to corroborate the

charge of murder. Petitioners testified on their own behalf and denied guilt of the crime as charged, denied ever having signed the alleged confessions, asserted that the self-incriminating statements which they may have made orally were induced by force and fear, and offered in evidence testimony tending to establish their innocence of the crime. At the conclusion of the trial motions to dismiss were denied (R. 3), and the case submitted to the jury upon a lengthy set of instructions which took from the jury the question whether the alleged confessions were voluntary (R. 3). The jury found the petitioners guilty of murder in the first degree as charged, without recommendation of mercy, and sentence of death was imposed on the 6th day of June, 1949 (R. 39-40, 41, 70-2).

Upon the pronouncement of judgment, counsel for petitioners in open court orally served notice of appeal (R. 40, 41-2). The judge presiding thereupon allowed petitioners sixty days from the date of judgment in which to make and serve a statement of the case on appeal in accordance with the local practice; the State was allowed forty-five days thereafter to prepare and serve amendments to the petitioners' statement or a counter-statement (R. 40, 42). The transcript of the record made in the trial court comprised four volumes, totalling 704 typewritten pages. Counsel for petitioners received the entire transcript from the court reporter on or about fifty days after June 6th (R. 73). Thereafter counsel for petitioners prepared a statement of the case on appeal and served the same upon the Solicitor of Pitt County on August 6, 1949 (R. 73). Within forty-five days thereafter, the Solicitor served and filed 132 exceptions to the case on appeal and, in addition, moved to strike the case on appeal on the grounds that the last day for petitioners to serve such statement upon the Solicitor was August 5th, one day prior to the date of service (R. 74). A hearing

on the motion was held on September 29, 1949, before WILLIAMS, J., and at the conclusion thereof the motion of the Solicitor to strike petitioners' case on appeal was granted, and an order entered thereon on the grounds that the statement had been served one day late (R. 42-44). The effect of the order striking the statement of the case on appeal was to preclude an appeal on the merits to the North Carolina Supreme Court.

On September 27, 1949, prior to the order of WILLIAMS, J., petitioners filed with the Supreme Court of North Carolina a petition for writ of certiorari for the purpose of extending the time within which to docket their appeal in the said Supreme Court (R. 45-47); and subsequent to the order of September 29th of WILLIAMS, J., a supplemental petition for a writ of certiorari was filed in the said Supreme Court which recited the order of WILLIAMS, J., and prayed the North Carolina Supreme Court for leave to bring the cause before the said Court (R. 47-51).

In a decision dated November 2, 1949 (*State* v. *Daniels*, 231 N.C. 17, 56 S.E. 2d 2), the petition for certiorari was denied. In the opinion by SEAWELL, J., for the North Carolina Supreme Court, the reasons assigned by counsel for petitioners for the one day delay were noted, considered, and rejected, and the petition for certiorari was denied without examination of the errors assigned. The court indicated, however, that serious federal questions were presented. The objections made to the exclusion of Negroes from the grand and petit juries, and to the admission in evidence of the alleged confessions were noted and the court then wrote as follows:

> ". . . Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordinarily in this situation resort may be had to writs of error coram nobis . . ."

"Since here the authority for the writ stems from the supervisory power given the Supreme Court in the section of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. In re Taylor, supra, 230 N.C. 566, 569, 53 S.E. 2d 875, 859. It is granted here only upon a 'prima facie showing of substantiality', and it is observed in the Taylor case last cited, 'The ultimate merits of the petitioner's claim are not for us, but for the trial court.'"

"On consideration in the trial court, if the decision is adverse to the petitioners, the Court will find the facts, and an appeal to this Court will lie as in other cases."

Subsequently, in accordance with the foregoing suggestion, upon notice to the Attorney General of North Carolina and the Solicitor of Pitt County, petitioners filed a petition with the Supreme Court of North Carolina for writ of error *coram nobis* in the Superior Court of Pitt County (R. 51-57). That petition set forth the errors of law and fact committed by the trial court and designated the federal questions presented.

The latter petition was denied in a *per curiam* opinion (*State* v. *Daniels*, 231 N.C. 241, 56 S.E. 2d 646), dated December 14, 1949, which described briefly the proceedings and then held:

"Their petition does not make a *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ. Citations, supra.

The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below. State v. Daniels, supra; In re Taylor (229 N.C. supra)." (R. 57-58).

Thereafter the Attorney General of North Carolina moved that the case and record be docketed and the appeal

dismissed. Upon said motion the North Carolina Supreme Court held (*State* v. *Daniels*, 231 N.C. 509, 57 S. E. 2d 653):

> "We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed." (R. 60).

On January 31, 1950, Mr. Chief Justice VINSON of the United States Supreme Court signed an order, upon motion of petitioners, extending their time to March 14, 1950 to file with that Court a petition for a writ of certiorari from all of the foregoing judgments; by order dated March 2, 1950, Chief Justice STACEY of the North Carolina Supreme Court stayed the sentence of death pending the disposition of the petition to the United States Supreme Court.

In its brief upon the aforesaid petition, the State of North Carolina asserted the following:

> "Since the Supreme Court of North Carolina merely held that the petition was insufficient, there is no reason why the Petitioners cannot now avail themselves of this remedy [petition to the North Carolina Superior Court for writ of error *coram nobis*] if they will file a proper and sufficient petition before the Supreme Court of North Carolina. The Respondent, therefore, contends that the Petitioners have never exhausted their remedies afforded by the Supreme Court of North Carolina for a review of this question. The Supreme Court of North Carolina has, therefore, not passed upon the constitutional issues now raised by the Petitioners." *Daniels, et ano.* v. *State of North Carolina*, United States Supreme Court, October Term, 1949, No. 412, Misc., Respondent's Brief, p. 28.

On May 8, 1950, this Court denied the aforesaid petition for writ of certiorari without opinion. *Daniels* v. *North Carolina*, 339 U.S. 954.

Petitioners thereupon submitted another petition to the Supreme Court of North Carolina for a writ of error *coram nobis* in order to obtain a review, for the first time, upon the merits of the constitutional issues raised (R. 62). But the said petition was denied by a decision of the North Carolina Supreme Court dated May 24, 1950, wherein the North Carolina Supreme Court indicated that it considered that the second petition for a writ of error *coram nobis* presented no new facts and that said petition was therefore insufficient. *State* v. *Daniels*, 232 N.C. 196, 59 S. E. 2d 430 (R. 62-64).

Subsequent to the denial of petitioners' second petition for writ of error *coram nobis*, petitioners initiated the instant proceeding in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division. In connection with their petition for writ of habeas corpus the District Court authorized petitioners to proceed in forma pauperis and granted them a stay of execution. Thereafter the writ was issued by the District Court and the stay of execution continued (R. 64-65). Respondent filed his return to the writ and his answer to the petition was made on June 20, 1950 (R. 19-64, 66, 69-72).

In their petition for habeas corpus petitioners raised the following grounds:

(1) That Negroes were purposefully and systematically excluded from grand and/or petit juries in Pitt County, including the grand jury which indicated and the petit jury which convicted petitioners, solely for reasons of race or color and that petitioners were therefore denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United State Constitution;

(2) That the alleged confessions admitted in evidence upon the said trial were obtained under circumstances which were actually or inherently coercive and that the

aforesaid alleged confessions were therefore involuntary and the admission thereof in evidence constituted a denial of due process of law;

(3) That the instruction of the trial judge to the jury that the alleged confessions were voluntary for all purposes deprived petitioners of their right to trial by jury in a capital case in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(4) That the refusal by the North Carolina Supreme Court to entertain an appeal on the merits by petitioners from their convictions was, in view of the statutory right to such appeal, a violation of the equal protection of the laws guaranteed to petitioners by the Fourteenth Amendment to the United States Constitution.

Hearings were held on the aforesaid petition and the return thereto on December 18, 1950 through December 21, 1950 and, again, on May 18, 1951. Evidence was introduced by petitioners and respondent. In connection with the submission of evidence by petitioners on the aforesaid matters raised in the petition for writ of habeas corpus, the respondent moved to dismiss the petition and to exclude from evidence any matters which had been subject to inquiry upon the initial trial (R. 67-69). The motion to dismiss was denied and the motion to exclude the evidence was denied by the trial judge (R. 82, 88-89); he therefore proceeded to a hearing of the issues raised on the merits.

On July 14, 1951 the District Court filed an order vacating the writ theretofore issued, dismissed the petition, and remanded the petitioners to respondent for further proceedings under the judgment of the Superior Court of North Carolina (R. 95-96); and on that same date filed its Findings of Fact and Conclusions of Law (R. 77-83) and Memorandum Opinion (R. 83-95). The District Court had heard the petition on the merits but in its decision relied primarily on

the view that the issues here raised had been passed on by the North Carolina Supreme Court and by the United States Supreme Court in the denial of certiorari.

Notice of appeal to the Court of Appeals for the Fourth Circuit was then duly and timely filed. The District Court authorized the appeal by allowing petitioners' application for a certificate of probable cause and simultaneously stayed execution of the judgment and sentence of death (R. 96-97). Permission to prosecute the appeal in *forma pauperis* was granted by order of the Court of Appeals for the Fourth Circuit made on August 28, 1951. The appeal was heard on October 12, 1951, and the judgment of the District Court affirmed by decision of the Court of Appeals on November 5, 1951 (R. 341). PARKER, C. J., wrote the opinion for the majority of the Court which was stated to be based exclusively on "the procedural history of the case" (R. 324) and concluded that the Court answered in the negative the sole "question involved . . . of permitting persons who have been represented by counsel and who have had the trial court pass on the identical questions that they wish to raise by habeas corpus to use that writ in lieu of an appeal to review the action of the trial court on those questions" (R. 326-327). A dissenting opinion was filed by Judge SOPER (R. 334-340). By order dated November 30, 1951, the Court of Appeals stayed its mandate for thirty days pending the filing with this Court of the instant petition for certiorari (R. 341-342).

Petitioners thereupon filed with this Court their petition for writ of certiorari and for permission to proceed *in forma pauperis*. The petition was granted as was leave thus to proceed (R. 342).

Questions Presented

1. Petitioners failed to comply with the local practice of the courts of North Carolina requiring, as a condition of

appeal, service of a statement of the case on appeal within sixty days of judgment in that here service was made on the State on the sixty-first day after the judgment of conviction of petitioners in the Superior Court of Pitt County, North Carolina; tlough the said service was accepted, the one day delay therein resulted in the dismissal of the appeal and in the foreclosure of the petitioners from any review in the courts of North Carolina of the constitutional issues raised by their convictions, whether by appeal, certiorari, habeas corpus, error coram nobis, or otherwise:

(A) Does the one day delay in service also bar petitioners from any federal review of their convictions and death sentences by habeas corpus?

(B) Have petitioners satisfied the requirements of Section 2254, Title 28 of the United States Code, in that they have exhausted all available state remedies and/or are there here present extraordinary circumstances which warrant the granting of the writ notwithstanding any failure to exhaust such remedies?

2. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that Negroes have been excluded, for reasons of race and color only, from the grand and/or petit juries of the county wherein the conviction was obtained?

3. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that involuntary confessions of petitioners were admitted in evidence against petitioners?

4. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that petitioners were deprived of the right to trial by jury by the charge of

the trial judge wherein the issue whether petitioners' alleged confessions were voluntary was taken from the jury?

5. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that petitioners were unreasonably deprived of the right to appeal accorded by the laws of the State of North Carolina?

6. Whether the evidence upon the original trial herein and/or upon the federal habeas corpus proceeding shows:

(A) That Negroes were purposefully and systematically excluded from grand and/or petit juries in Pitt County, including the grand jury which indicted and the petit jury which convicted petitioners, solely for reasons of race or color and that petitioners were therefore denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution;

(B) That the alleged confessions admitted in evidence upon the said trial were obtained under circumstances which were actually or inherently coercive, and that the aforesaid alleged confessions were therefore involuntary and the admission thereof in evidence a denial of due process of law;

(C) That the instruction of the trial judge to the jury that the alleged confessions were voluntary for all purposes deprived petitioners of their right to trial by jury in a capital case in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(D) That the refusal by the North Carolina Supreme Court to entertain an appeal on the merits by petitioners from their convictions was, in view of the statutory right to such appeal, a violation of the due process of law and equal protection of the laws guaranteed to petitioners by the Fourteenth Amendment to the United States Constitution.

Specification of Error

The Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court dismissing the petition for a writ of habeas corpus to discharge petitioners from the custody of respondent.

Summary of Argument

The evidence adduced herein establishes the following: Negroes were intentionally excluded from the grand and petit juries of Pitt County, North Carolina, wherein petitioners were indicted and convicted; petitioners were convicted upon the basis of alleged written confessions which were obtained under circumstances actually or inherently coercive; the charge of the state court trial judge to the jury on the question of the voluntariness of petitioners' alleged confessions took that question from the jury and was therefore tantamount to a directed verdict of guilt; and petitioners were unreasonably and unfairly deprived of their right to appeal to the Supreme Court of North Carolina from their convictions. Petitioners have never obtained a review on the merits concerning the foregoing matters in the courts of the State of North Carolina and, it is conceded by respondent, there is presently not available to petitioners any remedy or procedure in the aforesaid courts whereby petitioners can obtain redress for the gross and flagrant violation of their constitutional rights in the proceedings wherein they were convicted and sentenced to death. In the foregoing circumstances petitioners raise questions which warrant the exercise of federal habeas corpus jurisdiction. Such jurisdiction is not barred by Section 2254 of Title 28 of the United States Code in that petitioners have fully exhausted their state remedies; even if it could be said that they have failed to exhaust the state remedies heretofore available to them, petitioners make a sufficient showing under Section 2254 of the kind of "ex-

ceptional circumstances" to invoke federal habeas corpus jurisdiction. To date petitioners have been foreclosed from any review—whether state or federal—primarily, if not exclusively, because after timely filing of notice of appeal they served the statement of the case on appeal required by local practice one day late. The one day delay worked no hardship or prejudice to the State in any manner or fashion. In the interests of elementary justice and fair play, this Court should rectify a situation wherein, because of a procedural oversight trivial and inconsequential in nature, men are to be sent to their deaths without benefit of review of serious and grave constitutional infirmities in the procedures whereby they were convicted.

ARGUMENT

I

Petitioners' Sentence of Death, If Allowed to Stand, Will Deprive Them of Life Without the Due Process of Law and the Equal Protection of the Laws Guaranteed to Petitioners by the Fourteenth Amendment to the United States Constitution

Although the lower federal courts relied principally upon the "procedural history of the case" to deny habeas corpus, we think review of the substance of petitioners' claims a necessary predicate to a consideration of the procedural posture of this cause. The import accorded technicalities frequently depends upon the equity and the gravity of the interest allegedly impeded by such technicalities. Thus, in a case closely paralleling this one procedurally, the Court, impressed by the evident unfairness of the result reached below, declared it would "make such disposition of the case as justice requires" and proceeded to extricate the merits from a procedural impediment strikingly similar to the one at bar. *Patterson* v. *Alabama*, 294

U.S. 600. We think the facts here so overwhelmingly demonstrative of the deprivation of fundamental constitutional rights that they warrant priority in treatment so as to provide the context within which the alleged procedural barriers must be considered.

A

Negroes were purposefully and intentionally excluded from grand and/or petit juries in Pitt County solely for reasons of race and color.

The record upon the habeas corpus proceeding leaves no scintilla of doubt that in Pitt County, North Carolina, persons of the Negro race were and continue to be excluded from grand and petit juries. Evidence produced on this score by petitioners is so conclusive that respondent has at no point heretofore challenged in this proceeding petitioners' assertion that they were indicted and convicted by juries selected upon the basis of racial discrimination.

Petitioners have shown that although Negroes comprised 44.2% of the total population of Pitt County 21 years or over and approximately one-third of the 1946 tax list for the County[2] (R. 312-3), still no Negro had ever served on a grand jury in Pitt County (this remained true to the date of the hearing) (R. 121, 307) and Negroes constituted less than 1% of Pitt County petit jurors; no Negroes were on the grand jury which indicted petitioners and only one served on the petit jury which rendered the verdict. This much was shown at the criminal prosecution and affirmed at the habeas corpus hearing.

The further evidence in this proceeding makes clear that the small percentage of Negroes on Pitt County juries is due directly and entirely to the infinitesimal percentage of

[2] Chap. 9, § 1 of the North Carolina General Statutes makes the county tax lists the principal source to be used by the jury commissioners for the preparation of a jury list.

Negroes on the jury list compiled by the jury commissioners. Exhibits P-6(a) through P-6(u) at the habeas corpus proceeding (R. 101-6) show that the 1947 jury list—from which was drawn the grand and petit jurors who indicted and convicted petitioners—had at least 144 but no more than 186 Negroes out of a total of 10,000 (R. 182-6). Negroes, therefore, comprised less than 2% of the Pitt County jury list for 1947; and the evidence indicates that the percentage was less in previous years (R. 208, 212-5).

Moreover, the proof negates any suggestion that Negroes in Pitt County, as a class, did not possess the necessary mental qualifications for jury duty. It is not necessary for petitioners to rely exclusively on the rejection as a "violent presumption" any suggestion that Negroes as a class are unfit for jury duty. *Neal* v. *Delaware*, 103 U.S. 370, 397; *Norris* v. *Alabama*, 294 U.S. 587, 599. The evidence shows that the literacy rate among Pitt County Negroes in 1930 was 74.2% (U. S. Census, 1930, Table 13, p. 30). Respondent will concede that by 1947 that percentage was considerable higher, particularly in view of the census figures in evidence depicting the great rise in school attendance among Negroes in North Carolina from 1900 to 1940 (U. S. Census, 1940, Table 12, p. 25). The objective indicia of literacy, occupation and schooling of Negroes in Pitt County, to be found in the 1930 and 1940 United States Census, destroy any possible suggestion that none or only a tiny fraction of those Negroes was qualified for jury service. Indeed, the habeas corpus record shows that in several instances Negroes acknowledged to be qualified for jury duty by the jury commissioner authorized to compile the jury list, did not appear on that list (R. 198-9, 206-7, 209-211). There remains only the obvious—Negroes were excluded almost completely from Pitt County juries solely because of the color of their skins. ". . . chance or accident could hardly have accounted for the continuous omissions of

negroes from the grand jury lists for so long a period . . ." *Hill* v. *Texas*, 316 U.S. 400, 404; see also *Smith* v. *Texas*, 311 U.S. 128, 131. In the face of such overwhelming evidence of discrimination, the denials by the commissioners of any intent to discriminate is unavailing for otherwise the Fourteenth Amendment would be "but a vain and illusory requirement". *Norris* v. *Alabama*, 294 U.S. 587, 598.

That exclusion of Negroes from juries solely because they are Negroes deprives a Negro defendant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution is so well established that where such exclusion is found, the Court's decision consists only of citation of authority without discussion. See, *e.g.*, *Ross* v. *Texas*, 341 U.S. 918; *Shepherd, et al.* v. *Florida*, 341 U.S. 50; *Brunson, et al.* v. *North Carolina*, 333 U.S. 851; see also *Virginia* v. *Rives*, 100 U.S. 313, 322; *Strauder* v. *West Virginia*, 100 U.S. 303, *Ex parte Virginia*, 100 U.S. 339; *Neal* v. *Delaware*, 103 U.S. 370; *Bush* v. *Kentucky*, 107 U.S. 110; *Gibson* v. *Mississippi*, 162 U.S. 565, 584, 591; *Carter* v. *Texas*, 177 U.S. 442; *Martin* v. *Texas*, 200 U.S. 316, 321; *Norris* v. *Alabama*, 294 U.S. 587; *Hale* v. *Kentucky*, 303 U.S. 613; *Pierre* v. *Louisiana*, 306 U.S. 354; *Smith* v. *Texas*, 311 U.S. 128; *Hill* v. *Texas*, 316 U.S. 400; *Patton* v. *Mississippi*, 332 U.S. 463. Just as clear as the proposition of law stated is its applicability to this case. *Brunson, et al.* v. *North Carolina*, 333 U.S. 851, demonstrates the point conclusively. That case arose out of Forsythe County, North Carolina, only shortly before the trial of the petitioners herein. The record there shows convictions of five Negroes for misdemeanors and minor offenses. Upon objection to the composition of the juries, the evidence was that of total exclusion of Negroes from grand juries and Negroes constituting less than 1% of petit jurors. One Negro served on

the convicting jury. An analysis of the jury list showed in excess of 2% Negroes. Negroes were 45% of the population and about 20% of the taxpayers eligible for jury duty. On this set of facts the Court reversed with an opinion consisting of citations alone. Whatever differences exist between the facts of *Brunson* and this case strengthen petitioners' assertion of discriminatory exclusion of Negroes from Pitt County juries.

Two further factors were developed at the habeas corpus hearing which also render vulnerable the composition of Pitt County juries:

In the first place it is undisputed that the jury commissioners uniformly rejected as jurors persons whom they or their consultants did not personally know and that the commissioners neither investigated to ascertain the qualifications of such persons nor did they consult with members of the Negro community for such purpose;[3] in Pitt County the natural, if not intended effect of such procedure was to eliminate from the jury list a very substantial segment of that Negro community (R. 129, 130, 191, 192, 195, 196, 197, 202, 204, 209, 211-2). In the light of the relatively small percentage of Negroes on Pitt County jury lists and juries, and the total absence of Negroes from Pitt County grand juries, the failure of the commissioners diligently to ascertain the jury qualifications of those Negroes whom they did not know was, under the decisions of this Court, a failure "to perform their constitutional duty . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U.S. 400, 404; *Smith* v. *Texas*, 311 U.S. 128, 132; *Cassell* v. *Texas*, 339 U.S. 282, 287-289.

The second factor developed upon the hearing is the

[3] One commissioner questioned two Negro educators, but only to learn which Negro school teachers were residents of his district (R. 202).

close correlation between the percentage of Negroes on the jury and voting registration lists of Pitt County. While the applicable statute requires the use of the county tax list as a primary source for the jury list; the evidence is decisive that at least the Negro section of the Pitt County tax list for 1946 was not used and that whatever Negroes did appear on the jury list came from the voting registration list (see, *e.g.*, R. 205, 216-221). Cf. *Patton* v. *Mississippi*, 332 U.S. 463, 467, 468. Moreover, the percentages of Negroes on the jury and registration lists, respectively, were so close to identity as to demonstrate a deliberate design to limit the percentage of Negroes on jury lists to the percentage on the registration list. Thus the percentages of both are above 1% and below 2% (R. 114-5, 118, 186, 312). This attempt to accomplish "proportional representation" is improper and invalid. *Cassell* v. *Texas*, 339 U.S. 282, 286-287; *Shepherd, et al.* v. *Florida*, 341 U.S. 50.

The facts in this case allow no conclusion other than that in Pitt County Negroes were not deemed eligible nor were they selected for jury duty solely on the basis of their qualifications therefor. Nothing but racial discrimination can explain the gap between the number of Negroes patently eligible and qualified to be jurors and the number chosen therefor. But since *Neal* v. *Delaware*, authorities responsible for such a condition disclaim any intent to discriminate and attempt to substitute "ingenious and ingenuous" explanations for the exclusion of Negroes from juries. Failure on their part to do so would be to admit the commission of a crime (18 U.S.C.A. § 243) as well as jeopardize the jury system molded to their purposes. Consequently, this Court begins rather than ends its inquiry with the self-serving declarations of the jury commissioners. Any inquiry into the facts must, of course, be with

full cognizance that petitioners, of necessity, had to call upon and prove their case through those self-same commissioners whom petitioners contend practiced illegal and unconstitutional racial discrimination in the exercise of their official duty. It cannot be expected, therefore, that the record here will contain any explicit avowal of discrimination—such discrimination, if present, can be gleaned only if the Court is prepared to make those reasonable inferences which fairly evolve from the facts. Petitioners submit that so viewed the record contains every proof, apart from explicit avowals, of racial discrimination in the selection of past and present jurors in Pitt County.

B

The alleged confessions of petitioners were obtained under actually and inherently coercive circumstances.[4]

The murder of Willi[illegible] Benjamin O'Neal occurred late in the night of Saturday, February 5, 1949 (S. Tr. 406).[5] The testimony of Sheriff Tyson of Pitt County, where the crime was committed, was that the police had received an undisclosed tip which led them to search out the petitioners (S. Tr. 404). On Sunday, February 6, several officers went to the home of Lloyd Daniels and there questioned his mother as to his whereabouts (S. Tr. 574-6). On the Saturday night of the murder, Bennie had slept at the home of Lloyd (S. Tr. 500) and then Sunday afternoon the two had gone into the City of Greenville (S. Tr. 449; R. 135). When questioned, Lloyd's mother had notified the police that Lloyd had gone to see his sister (S. Tr. 575-6). At the home of Lloyd's sister, Lloyd and Bennie

[4] Except where otherwise indicated, the facts recited in this point are either admitted or uncontradicted.

[5] Pages of the transcript of the criminal trial, which was put in evidence at the hearing (R. 24) and is part of the unprinted record before the Court, will hereinafter be referred to as "S. Tr."

learned that men bent on violence were looking for them to avenge the killing of O'Neal (S. Tr. 449, 503-4, 531-2; R. 136). They went down to the railroad tracks together, anxious and concerned about the threat of which they had heard, and while Bennie decided to remain in the nearby woods for a while, Lloyd went back into town and took a bus to the home of his girl friend (S. Tr. 449, 529, 533; R. 136). He arrived there 6:35 P.M. on the Sunday of February 6th (S. Tr. 335). It was at this home that he was arrested by at least six white officers (R. 143, 156) of whom at least three were armed (S. Tr. 203, 249, 367).

Lloyd's arrest was made sometime between 1:00 A.M. and 1:30 A.M., February 7th (R. 155). The arrest was concededly made without a warrant (R. 152-3, 168). Lloyd was handcuffed (S. Tr. 203, 249, 367; R. 137) and he and the officers walked about a mile through the night to where the police car was parked (S. Tr. 206; R. 156, 164-5). According to the police, Lloyd was warned that whatever he would say might be used against him (S. Tr. 239; R. 157; cf. S. Tr. 449, 221-223), but it is admitted that he was not told where he was being taken,[6] and that he was not told of his right to stand mute or of his right to the advice of friends or counsel (S. Tr. 369; R. 165).[7]

[6] "Q. He didn't know where you were going? A. (Sheriff Tyson) No.
Q. You didn't tell him? A. No.
Q. And he didn't ask you? A. No.
Q. It was dark out there? A. Yes." (S. Tr. 204; see also S. Tr. 295, 449).

[7] § 15-47 of c. 15, Art. 6, of the General Statutes of North Carolina provides:

> "Upon the arrest, detention, or deprivation of the liberties of any person by an officer of this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him . . .; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied."

Upon reaching the police car after his arrest, Lloyd was placed in the back seat with Officer Gibbs and in the front seat were Officer Manning and Sheriff Tyson (R. 157). Lloyd remained handcuffed; each of these police officers was armed (S. Tr. 203, 249, 367; R. 166, 242). The officers testified that after ten minutes in the car, Lloyd volunteered freely, and without coercion by threat or promise, to confess (R. 157, 243, 247-8), and Officer Gibbs stated that he wrote down Lloyd's statement which was ultimately marked by Lloyd with his sign (S. Tr. Ex. 32; R. 176). Lloyd denied having made any voluntary confession en route to Williamston (S. Tr. 221-229, 450-452; R. 138-9). His testimony was that Gibbs threatened to kill him or his mother unless he admitted the murder of O'Neal (S. Tr. 221-223; 225-229, 450-451; R. 138-9). Lloyd also denied having annexed his mark to the statement prepared by Gibbs.[8] On the trip during which Lloyd allegedly confessed the police car "broke down" for about thirty minutes and during that period Tyson and Manning went out to inspect the car and Gibbs was left alone with Lloyd in the back seat (S. Tr. 208, 211-229, 242-243, 295, 450-451; R. 158-9, 244). By some fortuitous circumstance the car broke down in a deserted area with only one house nearby

[8] The evidence strongly supports Lloyd's version of the facts and makes Gibbs' version virtually incredible. Thus, while Gibbs swore that the statement was in the words of Lloyd (S. Tr. 370-371), it is abundantly clear that Lloyd could not possibly have used the language contained in Ex. 32 (S. Tr. 363-364). The failure to arraign or otherwise bring Lloyd before a hearing officer after the alleged confession also impairs Gibbs' story as does the circumstace that Gibbs did not inform Tyson, the Sheriff, of Lloyd's allegedly signed confession (S. Tr. 245, 298, 376). Notably absent from the alleged confession of Lloyd are the signatures of any witnesses—a practice meticulously followed in other instances in this case (S. Tr. 364, 452); and the efforts by Gibbs to obtain statements of a confession by Lloyd from others even after Lloyd's alleged confession hardly sustains Gibbs' testimony (S. Tr. 336, 367). Under all the circumstances, this Court is at liberty to disregard the patent fabrication that Lloyd signed a confession on February 7th. *Norris* v. *Alabama*, 294 U.S. 587, 593; *Ward* v. *Texas*, 316 U.S. 547, 553; *Akins* v. *Texas*, 325 U.S. 398, 402.

(S. Tr. 208). Subsequently, at an undisclosed time (S. Tr. 240), the prisoner was brought to the jail at Williamston and there put in a cell (R. 165).[9] Tyson testified that Lloyd was thus transported because Tyson had been notified "feeling was running pretty high in Greenville. I didn't think it would be safe to bring him back to Greenville" (R. 165-6; see also R. 177). Concededly Lloyd was not thereupon arraigned or brought before a magistrate as required by the law of North Carolina (R. 166-7).[10]

Bennie remained in the woods until late Sunday night, February 6th, when he went to the home of his cousin and then to his own home (S. Tr. 503, 544-546; R. 146). There he told his mother of the threats against his life that he had heard of in Greenville (S. Tr. 505, 546). Fearful that police or a mob in search for Bennie might also lynch her and the members of her family,[11] Bennie's mother told him to go to the farm of a neighbor; the latter, in turn fearful of trouble, sent him to another farm (R. 147). It was there that Bennie was picked up at about 5:00 A.M. on Tuesday morning, February 8th (R. 159).

Bennie was arrested by four white men, including at least one armed officer (S. Tr. 215, 219, 258, 259, 270, 365;

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[9] The murder was committed a few miles from Greenville, which is the seat of Pitt County (R. 165); the petitioners lived in and were tried in Pitt County. When arrested, however, they were taken to Williamston which is in Martin County; Williamston is approximately 30 miles from Greenville (R. 165).

[10] General Statutes of North Carolina, c. 15, Art. 6, §15-46: "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereupon proceed to act as may be required by law."

[11] Bennie testified: "I heard that some men said that wherever they seen us at they were going to kill us. I told Mama and Daddy and they said 'You better leave tonight they might come and kill you and all of us' and I went to a colored man's house and late that night the officers came and got me." (S. Tr. 503).

R. 148, 159). His arrest too was made without a warrant (R. 152-3, 168). He was handcuffed (R. 148), and taken from one car to a second car (R. 149, 159). In the second car, according to the testimony of the officers, Bennie, with little or no prompting, also voluntarily confessed to the murder of O'Neal (S. Tr. 216, 219, 258, 271, 366, 383-384; R. 159-160, 240-1, 244-5, 250). Bennie testified, however, that he made no self-incriminating statement at that time (S. Tr. 230, 235) and the absence of any signed written statement obtained from him in the car supports his testimony. As in the case of Lloyd, Bennie, too, was taken to the distant jail in Williamston out of Pitt County without being told where he was being taken; he was not told of his right to stand mute and was not told of his right to the advice to friends and counsel guaranteed to him under the laws of North Carolina (R. 171).[12] And also, as in the case of Lloyd, even after his alleged oral confession Bennie was not brought before a magistrate or other hearing officer after his arrest (R. 167). Instead, he was put in a jail cell in a county out of Pitt County and without any notification to his friends or family.

When asked for an explanation for his arrest of petitioners without warrants and their subsequent detention without arraignment, Sheriff Tyson testified:

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[12] On cross-examination Tyson testified:

"Q. Had you permitted Bennie Daniels to see his family? A. He hadn't asked to see them.

Q. He hadn't seen any lawyer at that time? A. Not as I know of. I left him in Williamston Tuesday morning and didn't see him until Tuesday night.

Q. By the Court: Did he make any request to see anybody? A. He did not . . .

Q. Did Bennie's people know that he was taken to Williamston? A. They didn't know it as I know of. They knew that I had arrested him. I told his daddy we had arrested him.

Q. Did they know where he was? A. Not as I know of.

Q. Did you tell him? A. No." (S. Tr. 218; see also R. 169).

"Q. Will you tell us why you didn't have Lloyd Ray arraigned promptly upon arriving in Williamston? A. I couldn't have him arraigned until Court convened.

Q. Are you familiar with Section 15-46 of the General Statute of North Carolina, as follows: 'Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law'?

A. Yes, sir, I have read that.

Q. Did you take Lloyd Ray before a magistrate on Sunday morning when you arrested him? A. No.

Q. Tell us why you didn't? A. That is not the usual custom when you arrest a man charged with murder.

Q. Is it the usual custom to detain them illegally?

Objection by Respondent overruled.

I ask you if it is the usual custom in your county when you arrest someone for a felony not to bring them before a magistrate? A. No, I don't say that. We usually get a warrant for them as quickly as we can.

Q. You didn't do it in this case? A. He was arrested around one-thirty and we were still continuing investigation and looking for the other party.

Q. You mean you didn't have the time to take him before a magistrate? A. I wouldn't say I didn't have time but I felt like it was up to me and very important to arrest the other party as soon as we could.

Q. When did you arrest Bennie? A. Bennie was arrested on Tuesday morning around five o'clock.

Q. And when did you have him in Williamston? A. Immediately after he was arrested.

Q. Did you take him before a magistrate at that time? A. No, sir." (R. 166-7).

Sometime in the late afternoon of February 8th, Lloyd was brought down to the office of Sheriff Roebuck and Bennie [12a] was brought into a separate room in that office (S. Tr. 266, 299; R. 161, 179, 245). They were questioned separately for a period of at least an hour or an hour and a half (S. Tr. 251, 261, 266, 299; R. 140-1, 179) with at least six or seven white men present (S. Tr. 212, 243, 251, 374, 393; R. 179, 256). The police officers testified that at the end of that time, and sometime between 6:00 and 7:00 P.M. on February 8th (S. Tr. 212), full confessions had been obtained from each of the petitioners, that the two were confronted with each other at that time and each of the confessions read to both of them, that the confessions were acknowledged by the petitioners to be true statements, and that Lloyd then made his mark on his statement and Bennie signed his (S. Tr. 214, 217, 244-246, 252-253, 254, 266, 271-272, 306, 393, 410-411; R. 162, 174-5, 237, 245, 249, 253-4). The petitioners testified to the contrary. They denied ever acknowledging that they had committed the murder of O'Neal and they denied ever signing or making their mark on the alleged confessions (S. Tr. 261-264, 230-233, 453).[13]

[12a] Bennie testified that he had been questioned, threatened and beaten in his cell before being brought down to the office (S. Tr. 230-235, 508-509; R. 150-1).

[13] The language employed in the alleged confessions (Ex. 8, 9, S. Tr. 273-278; R. 273-6) is language alien to the vocabulary (see, *e.g.*, S. Tr. 493), the grammatical faculties and the mentality (see R. 154-5) of these two illiterates who, prior to the trial, had been committed to a state institution for examination to determine their mental competency. It is furthermore noteworthy that each alleged final confession consisted of an introductory statement on the first page, admittedly not in the language of the alleged confessor, and on the rest of that first page the body of the confession; the first page of each of the confessions was unsigned; in each confession there appeared on the second page thereof a concluding paragraph also admittedly not in the language of either of the petitioners and it was the second page alone which was allegedly signed by petitioners; in each case there appeared to have been room on the front page for the concluding paragraph and the signature of petitioner (R. 170-4, 179).

It is undisputed, however, that prior to the alleged confessions neither Lloyd nor Bennie had had the benefit of advice of or contact with friends, family, or counsel (S. Tr. 212, 248, 323; R. 171); nor is it disputed that 10 to 15 minutes after the confessions were allegedly signed, the petitioners were taken from the jail in Williamston to Raleigh, 125 miles from Williamston and almost 100 miles from Greenville (R. 168). Again Tyson testified that this more distant removal of petitioners was required by considerations of safety (R. 168-9). For over two months after their arrest petitioners did not see their families (R. 142-3).

Although the petitioners denied the signed confessions which were admitted in evidence, they may, nevertheless, challenge the alleged confessions on the grounds that such confessions were extorted and involuntary. *Lee* v. *Mississippi*, 332 U. S. 742; *White* v. *Texas*, 310 U. S. 530, 531, 532. For so long as a coerced confession has been admitted in evidence, the denial of the existence of a confession "can hardly legalize a procedure which conflicts with the accepted principles of due process". *Lee* v. *Mississippi*, *supra*, at 745. Similarly, if the alleged signed confessions were coerced, their admission into evidence may be challenged and was error irrespective of the voluntariness of any earlier or subsequent alleged oral confessions. *Stroble* v. *California*, 20 U.S. Law Week 4244, 4246.

At least since *Brown* v. *Mississippi*, 297 U.S. 278, it has been the undeviating practice of this Court to review and reverse convictions after trials at which there was admitted in evidence confessions induced by physical or mental coercion. *Chambers* v. *Florida*, 309 U.S. 227; *Canty* v. *Alabama*, 309 U.S. 629; *White* v. *Texas*, 309 U.S. 631; *id.*, 310 U. S. 530; *Lomax* v. *Texas*, 313 U.S. 544; *Vernon* v. *Alabama*, 313 U.S. 547; *Ward* v. *Texas*, 316 U.S. 547; *Ashcraft* v. *Tennessee*, 322 U.S. 143; *id.*, 327 U.S. 274; *Malinski* v.

New York, 324 U.S. 401; *Haley* v. *Ohio*, 332 U.S. 596; *Lee* v. *Mississippi*, 332 U.S. 742; *Watts* v. *Indiana*, 338 U.S. 49; *Turner* v. *Pennsylvania*, 338 U.S. 62; *Harris* v. *South Carolina*, 338 U.S. 68. It is particularly appropriate for this Court to review the facts herein to determine independently whether they spell out coercion in view of the instruction to the jury which made the trial judge the exclusive trier of the fact whether the confessions of Bennie and Lloyd were voluntary.

Ward v. *Texas*, 316 U.S. 547, provides the point of departure for evaluating the undisputed and uncontradicted evidence here. BYRNES, J., in that case stated the applicable criteria:

> "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal." (316 U.S., at 555)

The petitioners are Negroes of a southern community.[14] Each was 17 years of age when he was arrested (R. 100A, 100B). Each is one of ten children (R. 132, 145). Lloyd has never had any schooling in his life, his only occupation has been that of farming, and he could neither read nor write (S. Tr. 446, 229; R. 133). Bennie has had two years of schooling but cannot read or write except to write his own name (S. Tr. 498; R. 145). He, too, had never engaged in any occupation more sophisticated than that of farming. The crime for which they were arrested was

[14] The residents of Greenville have been described as follows: "White inhabitants are chiefly descendants of early English settlers, and most of the Negroes . . . are descended from the slaves on the cotton and tobacco plantations." Federal Works Administration, North Carolina (1939) 511.

the murder of a white man and that murder was committed in an extraordinarily brutal fashion. O'Neal had been stabbed, cut and bludgeoned to death, so that his features were practically beyond recognition. Such a crime is well calculated to inflame the passions of a community. The petitioners were warned, before their arrest, that the murder had been committed and that they were being sought for that murder. It was reported to them that "this man was killed out in the country and they said wherever they found you that's where they are going to leave you" (S. Tr. 504; see also S. Tr. 449, 503). The sheriff of the county so appraised the imminence of mob violence that immediately upon the arrest of petitioners he took them to a jail 30 miles from the county of the crime, their home, and their families; and several days after the crime, following petitioners' alleged confessions, the sheriff moved them to a still more distant refuge for their "safety" (R. 168-9).

Each of the petitioners was arrested in the middle of the night by numerous white, armed police officers. Each was then handcuffed, walked a considerable distance in the dark, and then driven for another more considerable distance in the dark. In the instance of Lloyd, the ride also included a delay of about 30 minutes on a desolate road. Both were driven to a jail in a different county and community from their own without notice thereof to friends or family. In neither instance did the police obtain a warrant of arrest and in both instances the petitioners were illegally detained without being arraigned and without a hearing until sometime after their alleged confessions were reduced to writing. In the case of Lloyd, he was thus unlawfully detained for about 42 hours before his final alleged confession was reduced to writing; Bennie was thus held without a hearing for about 14 hours. Their alleged confessions were made without their having had the benefit of the advice of friends, relatives or counsel and without being informed of their

right to such assistance; and those confessions came at the end of persistent questioning in the presence of six or seven white police officers and a stenographer who was there present waiting to prepare their written confessions. Ten or fifteen minutes after the confessions were allegedly signed, the petitioners were taken to the jail house in another county, still more distant from their homes, friends and families.

Cumulatively, if not separately, the foregoing undisputed facts in this case necessitate the conclusion that there are here the inherently coercive circumstances which, under the decisions of this Court, render any resulting confession invalid and inadmissible. The youthful age of the petitioners (*Chambers* v. *Florida, supra; Haley* v. *Ohio, supra*); their illiteracy (*Harris* v. *South Carolina, supra; White* v. *Texas, supra*); the brutality of the crime and the threats of mob violence (*Chambers* v. *Florida, supra; Ward* v. *Texas, supra*); the circumstances of their arrest and being taken to a jail in a different county (*Ward* v. *Texas, supra*); their illegal arrest and detention without hearing or arraignment (*Harris* v. *South Carolina, supra; Turner* v. *Pennsylvania, supra; Watts* v. *Indiana, supra; Haley* v. *Ohio, supra*) and without any communication with family, friends or counsel (*Harris* v. *South Carolina, supra; Ashcraft* v. *Tennessee, supra; White* v. *Texas, supra; Chambers* v. *Florida, supra*); and the harrowing questioning which led up to the alleged confessions all combine to make those documents tainted and constitutionally inadmissible.

C

The Instructions to the jury of the trial judge concerning the alleged confessions effectively deprived petitioners of trial by jury.

At the conclusion of the trial, the trial judge gave the jury an instruction of unusual length, prolixity and complexity.

In the course of that instruction he charged the jury as follows:

> "Ladies and Gentlemen of the Jury: With respect to the statements referred to in the alleged confessions there has been some argument about whether or not they were made freely and voluntarily. I instruct you that the circumstances and conditions under which the statements made were investigated by the Court under preliminary examination of the Court as to whether they were made freely and voluntarily and are competent to be admitted in evidence but you are the sole judges of the weight to be given them and the credit to be given them."
>
> "And, with respect to whether the statements were made freely and voluntarily under the law it is the province of the Court to determine that, in order to determine whether or not they are admissible as evidence. The Court has decided that they were admissible as evidence because they were made without coercion or inducement, freely and voluntarily. But, you are not to infer from that that the Court has any intimation or wishes to be giving any intimation as to the weight you will give that evidence. That is solely a matter for you." (S. Tr. 642, 680; R. 16-17).

The aforesaid instruction plainly informed the jury that it was not to consider whether the alleged confessions which alone could sustain the State's case, were made freely and voluntarily. The jury was permitted to pass upon the weight to be assigned to those alleged confessions but that function was illusory at best for if the jury was obliged to accept the confessions as having been made freely and voluntarily it could hardly fail to give these confessions conclusive weight. It is difficult to conceive of any evidence more damaging and more conclusive than a confession made freely and voluntarily.

The question whether the alleged confessions were made

freely and voluntarily was a disputed material issue of fact upon the trial. It was, of course, a proper function of the trial judge to pass upon that question for the purpose of determining the admissibility of the alleged confessions. But the trial judge went further and took that question of voluntariness from the consideration of the jury entirely as that question related to the innocence or guilt of the petitioners, and, in effect, directed the verdict of the jury on a material issue of fact in a criminal case.

Petitioners contend that the right to trial by jury in a capital cause is the kind of fundamental and basic right which is guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as essential to "a fair and enlightened system of justice" (*Palko* v. *Connecticut*, 302 U. S. 319, 325); and as an instruction which takes from a jury a material and disputed issue of fact is in violation of such a fundamental right to trial by jury (*Christoffel* v. *United States*, 338 U. S. 84; *Kanda* v. *United States*, 166 F. 91, 93 (C.A. 7), the action of the trial judge was "such as to deprive the petitioners of a trial according to the accepted course of legal proceedings" (*Buchalter* v. *New York*, 319 U.S. 427, 431) in violation of the Due Process Clause of the Fourteenth Amendment. In *Lyons* v. *Oklahoma*, 322 U.S. 596, 601, this Court indicated that due process under the Fourteenth Amendment requires that the "instruction fairly raises the question of whether or not the challenged confession was voluntary."[15] Under

[15] A comprehensive note which appears at 170 ALR 567 indicates that 28 jurisdictions expressly require that the question of voluntariness be left to the jury, 8 jurisdictions have a doubtful rule on the subject, and 12 jurisdictions permit the trial judge to pass finally upon the question of voluntariness of confessions. This Court has frequently noted with approval the practice of state courts to leave to juries the issue whether a confession was, in fact, voluntary (*Harris* v. *South Carolina*, 338 U.S. 68, 70; *Haley* v. *Ohio*, 332 U.S. 596, 599; *Malinski* v. *New York*, 324 U.S. 401, 404; *Lyons* v. *Oklahoma*, 322 U.S. 596, 600, 601; *Ashcraft* v. *Tennessee*, 322 U.S. 143,

the test of due process as thus stated, the instruction of the trial judge constituted fundamental constitutional error.

D.

Petitioners were unreasonably deprived of their right to appeal to the North Carolina Supreme Court.

The factual circumstances surrounding the dismissal of petitioners' appeal by the North Carolina Supreme Court have already been preliminarily set forth at pages 5-6 *supra*.

More particularly, the record shows (R. 72-5) that on June 6, 1949 the judgment of death by asphyxiation was rendered against the petitioners on a verdict of guilty of first degree murder. Thereupon petitioners noted an appeal to the Supreme Court of North Carolina and were allowed 60 days in which to make out and serve a statement of the case on appeal upon the Solicitor for the Fifth Judicial District of the State of North Carolina. Approximately one month passed before counsel for petitioners received the first volume of the record of the criminal trial, which first volume consisted of approximately 300 pages; and counsel for petitioners did not receive the full and complete record in the criminal cause from the court stenographer until approximately 50 or 51 days after June 6.

Despite the delay in the receipt of the record in the criminal cause, counsel for petitioners made all diligent efforts to prepare the statement of the case on appeal within the time prescribed so that although the last volume of the record was received about only one week prior to the expiration of the time for service of the statement of the case,

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145; *Lisenba* v. *California*, 314 U.S. 219, 234, 238; *Chambers* v. *Florida*, 309 U.S. 227, 228; *White* v. *Texas*, 309 U.S. 631), but petitioners have not found any opinion by the Court affirming a conviction wherein the issue of voluntariness was wholly taken from the jury.

on appeal, counsel for petitioners, by diligent and painstaking efforts, completed the preparation of said statement on the afternoon of Thursday, August 4, which was one day before the deadline.

On Friday, April 5, the last day on which service of the statement of the case on appeal could be made, Herman L. Taylor, Esq., one of the attorneys for petitioners, telephoned the office of the Honorable William J. Bundy, Solicitor, in Greenville, North Carolina, from Fayetteville, North Carolina, where Mr. Taylor was engaged in another matter, and by that telephone conversation Mr. Taylor attempted to communicate with Mr. Bundy for the purpose of serving the case on appeal. Mr. Taylor was informed by the telephone operator that the Solicitor was not in his office and Mr. Taylor thereupon spoke to Mrs. M. W. Fields, the Solicitor's secretary, and she informed Mr. Taylor that the Solicitor was not in his office or at his home and that he was out of town and could not be reached until Monday morning, August 8, when he would return to his office. Unable to contact the Solicitor in person, Mr. Taylor, on Saturday morning, August 6, 1949, left a copy of the statement of the case on appeal at the office of the Solicitor with the latter's secretary, and Mr. Taylor received in return a signed statement of acceptance of the statement by the said Mrs. M. W. Fields, on behalf of the Solicitor.

45 days thereafter the Solicitor served and filed 132 exceptions to the case on appeal, thereby indicating that he was in no wise prejudiced or injured by the one-day delay in the service of the case on appeal. Nevertheless the Supreme Court of the State of North Carolina, on the basis of the foregoing factual situation, dismissed on motion of the State and has refused and continues to refuse to entertain the appeal of the petitioners. For not only was the appeal not entertained and, ultimately, dismissed, but the

statutory substitute for appeal, the discretionary writ of certiorari (see Gen. Stat. North Carolina, c. 1, §1-269), was likewise denied by the North Carolina Supreme Court. Compare *McConnell* v. *Caldwell*, 51 N.C. 469, with *Zell Guano Co.* v. *Hicks*, 120 N.C. 25, 26 S.E. 650; *People's Bank, etc. Co.* v. *Parks*, 191 N.C. 263, 131 S.E. 637.

It is petitioners' view that the foregoing facts fall within the interdiction of this Court "that a discriminatory denial of the statutory right of appeal is a violation of the equal protection clause of the Fourteenth Amendment". *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran* v. *Kansas*, 316 U.S. 255. An unreasonable abuse of discretionary judicial power to foreclose state appellate remedies is a plain, and, indeed, a more effective deprivation of access to those remedies than the prison regulations which impeded the submission of appeal documents in the cited cases. For the dismissal of the appeal here and the refusal to reinstate it by the discretionary writ of certiorari was an adjudication that petitioners could not process their appeal—an adjudication of damning finality under North Carolina law in view of the absence of any other applicable state corrective procedure. And it is here contended by respondent that the denial of the appeal by the North Carolina Supreme Court not only barred any further state corrective process but federal habeas corpus as well. However deference to local appeal practice may have inflexibly required prompt perfecting of the appeal for the purposes of the *appeal*, we submit that the denial of the discretionary writ of certiorari, if it had the drastic and conclusive consequences for which respondent contends, was, in the circumstances, the kind of "discriminatory denial" of the state's appellate remedies which this Court proscribes.

II

Federal Habeas Corpus Is the Appropriate Remedy for the Kind of Violations of Federal Constitutional Rights Which Here Obtain

As late as 1950 it was said that "The Supreme Court has not specifically ruled on the question" whether a conviction could be attacked collaterally by federal habeas corpus on the ground that a coerced confession had been admitted in evidence. *Smith* v. *United States*, 187 F. 2d 192, 195 (App. D. C.), *cert. den.* 341 U.S. 927. No such doubt exists, of course, that petitioners may thus attack the judgment here under review if, as they contend, they were unreasonably deprived of their appellate remedies by the courts of North Carolina and thereby denied the equal protection of the laws. *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206; *Cochran* v. *Kansas*, 316 U.S. 255. And, on the other hand, older cases decided by this Court have expressed the view that federal habeas corpus is not available to challenge a state conviction on the ground that the defendant has been denied the equal protection of the laws because members of his race were purposefully excluded from the jury which indicted and/or convicted him (*Andrews* v. *Swartz*, 156 U.S. 272; *In re Wood*, 140 U.S. 278; see also *Kaizo v. Henry*, 211 U.S. 146), although such a circumstance was one of the factors which led to the allowance of the writ by the Court in *Moore* v. *Dempsey*, 261 U. S. 86. The decisions of the Court defining the applicable area of federal habeas corpus jurisdiction become clarified and unified only upon examination of the history of such jurisdiction with regard for the nature and scope of the jurisdiction of this Court to review the judgments of state courts.

The writ of habeas corpus, the origins of which the

scholars find obscure,[16] was part of the English common law judicial machinery received by this country. *McNally* v. *Hill*, 293 U.S. 131, 136; Moore, *op. cit. supra* at 417-419. At the time of its reception its function, with respect to testing the propriety of official detention, was limited largely to a review of the record for the purpose of ascertaining whether "the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction" (*Frank* v. *Mangum*, 237 U.S. 309, 330). Federal habeas corpus to review the detention of persons in state custody was even more limited—"no writ of *habeas corpus*, except *ad testificandum*, could be issued in the case of a prisoner in jail under commitment by a court or magistrate of a State" (*Whitten* v. *Tomlinson*, 160 U.S. 231, 239). By statute this federal habeas corpus jurisdiction over state action was slightly enlarged prior to 1867. Act of March 2, 1833, 4 Stat. 634, c. 57, § 7; Act of August 29, 1842, 5 Stat. 539, c. 257. Then in 1867, as a consequence of the Civil War, the predecessor to the present legislation circumscribing federal habeas corpus jurisdiction was adopted. Act of February 5, 1867, 14 Stat. 385, c. 28, § 1; Rev. Stat. §§ 751-766, 28 U.S.C.A. (1940) §§ 452-461; 28 U.S.C.A. (1948) §§ 2241-55. Federal courts were thereby authorized to grant the writ in the instance of a prisoner in state custody "in violation of the Constitution or of a law or treaty of the United States".

Notwithstanding the expansive federal jurisdiction granted and intended in the Act of 1867, this Court continued for some time to deem that jurisdiction limited to a test of jurisdiction over the subject matter. See, *e. g.*,

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[16] Longsdorf, "Habeas Corpus: A Protean Writ and Remedy", 8 FRD 179; Dobie, "Habeas Corpus in the Federal Courts", 13 Virginia Law Rev. 433; Note, "The Freedom Writ—The Expanding Use of Habeas Corpus", 61 Harvard Law Rev. 657; Moore's Commentary on the United States Judicial Code (1949) 417.

Goto v. *Lane*, 265 U.S. 393, 402; *Felts* v. *Murphy*, 201 U. S. 123; *Valentina* v. *Mercer*, 201 U. S. 131; *Bergemann* v. *Backer*, 157 U. S. 655; *Crossley* v. *California*, 168 U. S. 640; *Kohl* v. *Lehlback*, 160 U. S. 293. On occasion, however, even in the earlier cases, "jurisdictional" requirements were equated with constitutional mandates and prohibitions for purposes of federal habeas corpus, so that in *In re Nielsen*, 131 U. S. 176, 185, the Court described habeas corpus jurisdiction by reference to the "express provision of the Constitution, which bounds and limits all jurisdiction". See also *Rogers* v. *Peck*, 199 U. S. 425, 434; *Ex parte Siebold*, 100 U. S. 371, 376, 377; *Ex parte Yarbrough*, 110 U. S. 651, 654; *Ex parte Wilson*, 114 U. S. 417, 422. And on other occasions the writ was allowed upon a showing of a violation of rights more properly deriving from the Constitution than from any jurisdictional excess. *Minnesota* v. *Barber*, 136 U. S. 313; *Ex parte Siebold*, *supra*; *In re Nielsen*, *supra*; *In re Snow*, 120 U. S. 274; *Ex parte Bain*, 121 U. S. 1; *Ex parte Green*, 114 F. 959 (C. C. Ky.) But so long as there remained review as a matter of right of state court convictions by writ of error to the United States Supreme Court—a writ which existed almost from the beginning of the Republic [Judiciary Act of September 24, 1789, c. 20, § 25, 1 Stat. 85]—the pressure for an extended federal habeas corpus jurisdiction was not great and that pressure was subordinated to the considerations of comity and deference owing to the state courts which dictated that, as a matter of discretion, only the highest court in the federal judicial system should exercise the power to reverse the action of a state court (*Ex parte Royall*, 117 U. S. 241). It was in this context that the decisions of the Court in cases such as *Andrews* v. *Swartz*, *supra*, and *In re Wood*, *supra*, were rendered.

With the transition from review as a matter of right to

review as a matter of discretion effected by the Judiciary Acts of 1916 (39 Stat. 726) and 1925 (43 Stat. 936), it became inevitable that the pressure for expanding federal habeas corpus review of federal convictions would become more exigent. If the old channel of federal review became clogged till it allowed but a trickle, other routes had to be and were found to accommodate the surge of persons detained under state convictions asserting violation of federal constitutional rights. And that surge became even more urgent as the rights guaranteed under the Fourteenth Amendment to the United States Constitution received the expansive definition of the last twenty years. *Darr* v. *Burford*, 339 U. S. 200, 221 (FRANKFURTER, J. dissenting). The revision of the doctrine of the scope of federal habeas corpus jurisdiction reflected these pressures and the resultant accommodations. The test shifted perceptively from a review of "jurisdiction" to an inquiry whether fundamental constitutional rights had been abridged—from the gloss on the Act of 1867 dictated and allowed by expediency to the express language of the Act:

> "*Habeas corpus* is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty". *Wade* v. *Mayo*, 334 U. S. 672, 681.
>
> ". . . the federal courts will entertain habeas corpus to redress the violation of [a] federal constitutional right". *Hawk* v. *Olson*, 326 U. S. 271, 276.
>
> "[the writ is available when] the petitioner has exhausted his state remedies and, . . . he makes a substantial showing of a denial of federal right". *Ex parte Hawk*, 321 U. S. 114, 118.
>
> ". . . the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial

court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused . . . ." *Waley* v. *Johnston*, 316 U. S. 101, 104-105.

". . . if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of *habeas corpus is* available". *Bowen* v. *Johnston*, 306 U. S. 19, 24.

"There is preserved in full [by the new § 2241 of Title 28] the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution". Parker, "Limiting the Abuse of Habeas Corpus", 8 FRD 171, 178.[17]

That the admission into evidence of coerced confessions comes within the category of fundamental constitutional rights thus safeguarded by federal habeas corpus was settled by the Court just the other day in *Jennings* v. *Illinois*, 342 U. S. 104. There petitioners for federal habeas corpus complained that their convictions in the courts of the State of Illinois were the result of involuntary confessions. In writing for the Court, VINSON, C. J., declared:

"If their allegations are true and if their claims have not been waived at or after trial, petitioners are held in custody in violation of federal constitutional rights. Petitioners are entitled to their day in court for the resolution of these issues. Where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court to

[17] Various commentators have observed the foregoing shift from the so-called "jurisdictional" test to the so-called "fundamental constitutional rights" test. Note, 61 *Harvard Law Rev.* 657, 661; Moore, *op. cit. supra* at 419-423; Peters, "Collateral Attack By Habeas Corpus upon Federal Judgments in Criminal Courts", 23 *Wash. Law Rev.* 87, 89; McGraw & Stewart, "Limitations on Habeas Corpus in the Federal District Courts", 26 *Notre Dame Lawyer* 487, 488.

> secure protection of his federal rights." (342 U. S., at 110, 111).

This determination in *Jennings* v. *Illinois* was foreshadowed by many earlier decisions of the Court. In *Mooney* v. *Holohan*, 294 U. S. 103, it was held that federal habeas corpus jurisdiction extended to state prosecutions wherein perjured testimony was knowingly employed by the prosecution in order to obtain a conviction. That proposition is now so well settled that it is no longer open to controversy. *Pyle* v. *Kansas*, 317 U. S. 213; *Hawk* v. *Olson*, 326 U. S. 271, 275. If the writ will issue for the use of coerced or perjured testimony of one other than the accused, it follows that the writ should issue to remedy the use of coerced and perjured testimony of the accused. See *Hysler* v. *Florida*, 315 U. S. 411, 413; *Lisenba* v. *California*, 314 U. S. 219, 237; see also Peters, *op. cit. supra* at 99-100; Moore, *op. cit. supra* at 421, n. 19. Similarly, a plea of guilty induced by intimidation is properly the subject of attack by habeas corpus (*Waley* v. *Johnston*, 316 U. S. 101; *Von Moltke* v. *Gillies*, 332 U. S. 708); the analogous vulnerability of a coerced confession was explicitly stated in *Waley* v. *Johnston*, *supra*, at 104:

> "For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession".

Moreover, the Court has in numerous instances, *albeit* not habeas corpus proceedings, expressed in the strongest language its conviction that the infliction of punishment upon the basis of an involuntary confession is violative of those elementary notions of justice and fair play which, as has been seen, are sufficient to invoke relief by habeas corpus. In *Haley* v. *Ohio*, 332 U. S. 596, 607, the introduction into evidence of a confession elicited by physical or mental

duress was characterized as violative of "fundamental notions of fairness and justice"; similarly such confessions were deemed in *Malinski et al.* v. *New York*, 324 U. S. 401, 417, to run afoul of "those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses". The Court has gone so far as to hold that a conviction resulting from the use of a coerced confession is "void" (*Lee* v. *Mississippi*, 332 U. S. 742, 745). And in the earliest and most authoritative case on the subject, the then Chief Justice HUGHES wrote of a conviction based upon an involuntary confession:

> "The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner, *Mooney* v. *Holohan, supra*". *Brown* v. *Mississippi*, 297 U. S. 278, 287.

We think it therefore plain that the decision of the Court in *Jennings* v. *Illinois* makes explicit what has long been implicit in the decisions of the Court, *i.e.*, that the admission into evidence of an involuntary confession is constitutional error of such a nature and magnitude as to warrant relief by any appropriate means, including habeas corpus.

A challenge to a judgment rendered by juries from which have been excluded competent and qualified persons solely for reasons of race or color is even more clearly the proper subject of inquiry upon federal habeas corpus. For the constitution of the grand and petit juries are matters which literally go to "jurisdiction". One commentator has therefore concluded with respect to the right to challenge juries from which Negroes have been excluded:

> "If the defendant did not waive his right by failing to assert it at his trial, then it would always be available to him, even by a later application for a writ of habeas corpus". Peters, *op. cit. supra*, at 93.

This conclusion is warranted by the decisions of the Court which hold that the denial to a Negro defendant "of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and the laws of the United States" (*Neal* v. *Delaware*, 103 U. S. 370, 394; *Ex parte Virginia*, 100 U. S. 313, 322, 323; *Bush* v. *Kentucky*, 107 U. S. 110, 119; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Hale* v. *Kentucky*, 303 U. S. 613, 616; *Pierre* v. *Louisiana*, 306 U. S. 354, 361; *Hill* v. *Texas*, 316 U. S. 400, 406). Nor has the Court failed to make manifest its understanding that racial discrimination in the selection of jurors is a constitutional infirmity of the basic and fundamental kind required as a predicate for habeas corpus relief:[18]

> "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government". *Smith* v. *Texas*, 311 U. S. 128, 130.

And in *Hill* v. *Texas*, 316 U. S. 400, 406, the then Chief Justice STONE wrote for a unanimous Court:

> ". . . no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress

[18] The requirement that the error committed in a state trial be of a "fundamental" type abhorrent to elementary notions of justice is one which obtains with respect to determining which errors come within the scope of the Due Process Clause of the Fourteenth Amendment. Racial discrimination in the selection of jurors is of such a fundamental type but it is in addition a violation of the specific prohibition against the denial of the equal protection of the laws, which latter prohibition is by itself a basis for habeas corpus jurisdiction. *Cochran* v. *Kansas*, 316 U.S. 255; *Dowd* v. *United States ex rel Cook*, 340 U.S. 206. Accordingly, the practice of racial exclusion in the selection of jurors may entitle the defendant prejudiced thereby to habeas corpus relief irrespective of whether such a practice violates a "fundamental" constitutional right.

passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey* v. *Ohio*, 273 U. S. 510, 535. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained."

Accordingly, various lower federal courts have assumed that, if properly raised and preserved, error in the exclusion of Negroes from juries in a state prosecution would be a matter for review in the federal courts by habeas corpus. *Johnson* v. *Wilson*, 131 F. 2d 1 (C. A. 5); *United States ex rel Jackson* v. *Brady*, 133 F. 2d 476 (C. A. 4), *cert. den.* 319 U. S. 746; *Carruthers* v. *Reed*, 102 F. 2d 933 (C. A. 8), *cert. den.* 307 U. S. 643; *Johnson* v. *Sanford*, 167 F. 2d 738 (C. A. 5). One lower federal court addressed itself exactly and precisely to the effect that the change in the nature of this Court's jurisdiction after the Judiciary Act of 1925 had upon the right of a defendant in a state prosecution to challenge in federal habeas corpus the exclusion of Negroes from the trial jury:

"Counsel for Crawford [petitioner] contend that these cases are not applicable for, if he were remitted to Virginia and seasonably and properly raised the question here under consideration and the question was decided against him, at the present time and under the Judiciary Act of 1925, he could not, as of right, prosecute a writ of error from the Supreme Court of the United States to the highest court of the state of Virginia to which the case could be taken. It is true that

his right of review by writ of error from the Supreme Court of the United States on the facts of this case was taken away by the act of 1925, for under the law as it now stands no writ of error lies from the Supreme Court in this case, as the grand jury was not drawn under a statute of the state of Virginia which violated the Constitution of the United States. 43 Stat. 936, 937, c. 229, § 237 (28 U. S. C. A. § 344). He is, however, permitted by that act to apply to that court for certiorari, a discretionary writ. South Carolina v. Bailey, supra. If review on such application is not granted he undoubtedly, at that state of the proceedings, could have the matter reviewed on habeas corpus in the proper federal court, being without review in the Supreme Court on writ of error as of right. In re Royall, 117 U. S. 241, 252, 253; In re Wood, supra, 140 U. S. at pages 289, 290. It would not then be an endeavor by habeas corpus to intervene before trial or to review what ordinarily can be re-examined only on writ of error; and the federal court applied to could not, under such circumstances, properly refuse review on habeas corpus." *Hale* v. *Crawford*, 65 F. 2d 739, 749 (C. A. 1).

The relationship between a fair trial and a jury selected without regard to the race or color of its members is exemplified by the instant case. Petitioners are Negroes who were on trial for the devastating murder of a white man. The crime was broadcast through the community and inflamed sentiment to a dangerous pitch. The quality and orientation of that sentiment and the practice of exclusion of Negroes from juries derived from a common source. The community which will foreclose the Negro from exercising his rights and prerogatives as a citizen to sit as a juror will exercise less than calm, dispassionate and fair judgment of a Negro charged with the wanton, clandestine killing of a white man. Judgment by such a jury, the selection of which caters to and reflects racial discrimination against Negroes, would be a judgment predicated upon factors unrelated to the inno-

cence or guilt of the accused; a jury which mirrors the community pattern of racial discrimination would be incapable of fair and unbiased judgment. However scrupulous the observance of the regular forms of the trial process, the trial could not be the fair trial of the issue of the innocence or guilt of the accused which is inherent in our notion of elementary justice. In the circumstances we think the error of excluding Negroes from the juries which indicted and/or convicted petitioners was the kind of error which warrants relief by habeas corpus.

And, finally, the contention by petitioners that they were deprived of their right to trial by jury in a capital case as a result of the instruction by the trial judge to the jury, is yet another proper subject for federal habeas corpus in view of the plethora of authorities heretofore cited and discussed by petitioners for the proposition that federal habeas corpus is available where a defendant in a criminal case is deprived of a fair trial; an essential of which petitioners deem to be a trial by jury. *Lyons* v. *Oklahoma*, 322 U. S. 596, 601. In this connection we note that the trial judge's treatment of the confessions in his charge was not merely an erroneous instruction. It was far more. When the trial judge told the jury that the petitioners' alleged confessions were voluntary for all purposes he in effect directed a verdict of guilty and deprived petitioners of their right to a jury trial in a capital case. It is this fundamental right to a jury trial which petitioners seek to raise and, we respectfully submit, may raise in a federal habeas corpus proceeding.

The opinion of the Fourth Circuit suggests the view that, irrespective of the nature of the questions here raised, so long as those questions were the subject of or capable of fair review in the state courts they could not be reconsidered in the federal courts in a habeas corpus proceeding. In this view federal habeas corpus is confined to those cases

where either because of ignorance, fraud, duress, or lack of counsel, the petitioner could not at his trial or thereafter raise fundamental constitutional objections in the state courts, or to those cases where such basic, fundamental constitutional objections derive from matter *aliunde* the record—such as evidence obtained after a trial that the prosecution knowingly used perjured testimony—and the state provides no adequate remedy in such circumstances.[18a] The other, more usual situation, wherein the objections are raised at the state trial, there adjudicated, and thereafter reviewed, would, according to the Fourth Circuit, foreclose federal review no matter how gross the error and no matter how basic the right deprived; the alternative, according to the Fourth Circuit, would be to use the writ "in lieu of an appeal" (R. 327).

§2254, in terms, makes the exhaustion of state remedies a basis for not a bar to federal habeas corpus; the Fourth Circuit rule yields the opposite. For by that rule, once state remedies are exhausted—assuming their adequacy[18b]—federal habeas corpus is unavailable. This Court in *Ex parte Hawk*, 321 U. S. 114, 117, 118, squarely held that the "exhaustion" requirement is one distinct from and alternative to the requirement of "extraordinary circumstances"—and it is this latter requirement which comprehends the situation of inadequacy of remedies which the Fourth Circuit now treats as an indispensable, conjunctive condition for federal habeas corpus jurisdiction.

At bottom, the approach of the Fourth Circuit is in error

[18a] The Fourth Circuit's approach is fully set out in *Sanderlin* v. *Smyth*, 138 F. 2d 729, and seems also to be that followed by the Second Circuit (*United States ex rel Rheim* v. *Foster*, 175 F. 2d 772; *United States ex rel Steele* v. *Jackson*, 171 F. 2d 432, *cert. den.* 336 U. S. 939; *Schechtman* v. *Foster*, 172 F. 2d 339). The Court of Appeals for the District of Columbia appears to follow a similar view (*Kenion* v. *Gill*, 155 F. 2d 176; *Smith* v. *United States*, 187 F. 2d 192, *cert. den.* 341 U. S. 927).

[18b] Inadequacy of state remedies is a separate and alternative basis for federal habeas corpus review under §2254.

because it does not wholly defer to the above-described effect on federal habeas corpus jurisdiction worked by the change in the Judiciary Acts of 1916 and 1925 of this Court's jurisdiction over state court judgments. There has always been in our federal system some federal forum for the review of federal questions raised by one in state custody. But the Fourth Circuit considers that federal function to be sufficiently performed, in the ordinary situation, by this Court through the medium of certiorari jurisdiction. Petitioners disagree. Whereas the conflicting interests of federal review of federal questions and respect for the state courts could be accommodated, when the Court's jurisdiction was invoked by writ of error, by stringently limiting such review in the lower federal courts and largely confining the power to review and reverse to this Court, no such accommodation is possible now when the Court's jurisdiction is by writ of certiorari and, therefore, discretionary. At best, those conflicting interests can now be accommodated by giving this Court the "first crack" at reviewing and reversing, as was required in *Darr* v. *Burford*, 339 U. S. 200, and, if the Court declines such "first crack", allowing the petitioner to obtain review by federal habeas corpus. Beyond that this Court's certiorari jurisdiction cannot be extended to provide the principal federal forum for the review of federal questions. For, admittedly, certiorari jurisdiction is exercised on factors and conditions which, in considerable measure, are unrelated to the merits of the cause under review. *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912. If in passing on certiorari applications, the Court is thereby functioning—as it did on writs of error—as the first and last forum of federal review of important federal questions raised by persons held in state custody, as it would under the view of the Fourth Circuit in most such cases, then responsibility would dictate consideration of those applications upon bases and criteria char-

acteristic of writ of error jurisdiction—the very result it was intended to eliminate when, at the behest of the Court, the Acts of 1916 and 1925 were adopted.

In short, the certiorari jurisdiction of this Court was not intended to be and is not the sufficient federal forum for the review of fundamental federal questions raised by persons in state custody. That regard for the state courts which would seek, as far as possible, to authorize only this Court to reverse the action of the highest court of the state is now expressed and satisfied by the requirement of *Darr* v. *Burford* that certiorari must be sought before the institution of a habeas corpus proceeding. At the same time, however, the regard owing to those who complain that they have been deprived of their liberty in violation of fundamental federal mandates and prohibitions entitles them, once this Court has declined to review and reverse the state action complained of, to obtain that federal review of such objections which has traditionally inhered in our federal system; and for the person in such circumstances federal habeas corpus is the necessary and appropriate remedy.

We have shown that the questions here raised are of the kind and magnitude which warrant federal intervention, even after due deference is accorded to the independence and sovereignty of the state judiciary. It remains only to be seen whether the manner in which petitioners have applied for and exhausted the remedies provided by the law of North Carolina was sufficient compliance with §2254 which prescribes the predicate to federal habeas corpus jurisdiction for persons in state custody.

III

No Procedural Grounds Exist for Foreclosing Petitioners From Federal Habeas Corpus

It may be seen from the petition for the instant writ and from the return made thereon, that prior thereto, the pe-

titioners, in the following sequence, attempted to appeal the conviction to the Supreme Court of North Carolina, applied to that same Court for a writ of certiorari when the appeal was dismissed, applied to that same Court for a writ of error *coram nobis* when the writ of certiorari was denied, petitioned the Supreme Court of the United States for certiorari when the writ of error *coram nobis* was denied, and filed a second writ of error *coram nobis* with the Supreme Court of North Carolina when the writ of certiorari was denied by the United States Supreme Court [19] (R. 42-64). This habeas corpus proceeding was filed only after the second request for writ of error *coram nobis* was denied. Petitioners contend that the foregoing sequence of events exhausts petitioners' state remedies within the meaning of § 2254.

The decisions of the Supreme Court of North Carolina in this very case make it obvious that petitioners can no longer obtain a state remedy by way of appeal, certiorari or *coram nobis*.[20] The State of North Carolina does provide a procedure for the writ of habeas corpus. Gen. Stat. of North Carolina, c. 17. But respondent has never contended that said procedure is available to petitioners in this case, and the language of the statutory provisions as well as of the applicable decisions of North Carolina appear to foreclose application in North Carolina for habeas corpus. Section 17-4 of the General Statutes of North Carolina specifies:

> "Application to prosecute the writ shall be denied in the following cases: . . .

[19] No petition for writ of certiorari was filed with this Court from the denial of the second writ of error *coram nobis*. But as that latter denial was clearly on non-federal, state procedural grounds, no petition for certiorari was required. *White* v. *Ragen*, 324 U.S. 760, 765; *House* v. *Mayo*, 324 U.S. 42, 48.

[20] Nor can petitioners move for a new trial. See North Carolina, Gen. Stat. Ann. c. 15, § 15-174; c. 1, § 1-207.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree."

It well be noted that the statute does not merely require that the writ be denied in the cited circumstances, but that the application to prosecute the writ shall be denied. Thus, if petitioners are within the prohibition contained in Section 17-4, they literally do not have "the right under the law of the State to raise . . . the question presented" (28 U.S.C.A. § 2254) by habeas corpus. And as petitioners do not dispute that the judgment of conviction was that of a "competent tribunal"—at least within the meaning of the North Carolina law—it is clear that habeas corpus is not an available state remedy in this case. This conclusion becomes unassailable in the light of the recent decision of the North Carolina Supreme Court in *In re Taylor*, 229 N.C. 297, 49 S. E. 2d 749, where it was held that habeas corpus was not available even where the petitioner complained of the admitted deprivation of the constitutional right to counsel. See also, *Ex parte Steele*, 220 N. C. 685, 18 S. E. 2d 132; *State v. Dunn*, 159 N.C. 470, 74 S. E. 1014; *In re Holley*, 154 N.C. 163, 69 S. E. 872. The type of habeas corpus remedy thus afforded by North Carolina need not be exhausted as a prerequisite to federal relief. *Potter* v. *Dowd*, 146 F. 2d 244 (C.A. 7); cf. *Marino* v. *Ragen*, 332 U.S. 561, 563, 564 (RUTLEDGE, J., concurring).

In 1951, after the institution of this proceeding, North Carolina adopted a new, comprehensive post-conviction corrective procedure. Session Laws of North Carolina, 1951, c. 1083; North Carolina Gen. Stat. Ann. (1951 Supp.), c. 15, Article 22, §§ 15-217–15-222; see *Quick* v. *Anderson*, 194 F. 2d 183 (C.A. 4). The relief there provided extends to "Any person imprisoned . . . who asserts that in the pro-

ceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction . . ." § 15-217; see also § 15-218. Unfortunately, petitioners, having raised at their trial the questions here presented and having obtained from the trial court at least, an adjudication thereon, would appear to be without the scope of the newly-enacted corrective process. That process would be available only if petitioners had wholly failed to raise and preserve the errors they here complain of.

Notwithstanding the present total absence of any state remedy, the lower courts have denied relief: the District Court found herein that petitioners had received review and adjudication on the merits by the North Carolina Supreme Court and that that determination was conclusive (R. 89-91, 95); the Court of Appeals found that having failed to perfect the appeal on time, petitioners, in effect, forfeited their right to review on the merits by way of appeal and that habeas corpus could not be used in lieu of the appeal thus forfeited (R. 326-7, 331-2). We think that the North Carolina Supreme Court never reviewed the merits of the questions here raised.[21] But the result here is the same whether it did or not.

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[21] Respondent's position always has been that petitioners were never entitled to a review on the merits by the North Carolina Supreme Court because they had not served the statement of the case on appeal in a timely fashion. Indeed, as has heretofore been indicated, before the United States Supreme Court the State of North Carolina represented that "The Supreme Court of North Carolina, has, however, not passed upon the constitutional issues now raised by the petitioners" (see p. 8, *supra*). Upon the hearing before the District Court it was apparent that that Court, at least at the time of the hearing, did not consider that the North Carolina Supreme Court had passed upon the federal questions here presented for the District Court allowed petitioners to introduce evidence attacking the judgment of the state court collaterally and, in fact, denied respondent's motion to dismiss the petition and overruled the motion of respondent to exclude and/or strike

If petitioners did obtain a review on the merits as part of the appeal, then there can be no question that petitioners have fulfilled the exhaustion requirements of §2254. And if such review can be said to have been had by dint of petitioners alternative applications for relief by way of certiorari or writ of error *coram nobis*, then under that branch of *Wade* v. *Mayo*, 334 U. S. 672, which has not been disturbed by *Darr* v. *Burford*, 339 U. S. 200, again petitioners have exhausted their state remedies. *United States ex rel Morrison* v. *Foster*, 175 F. 2d 495 (C. A. 2); *Commonwealth of Pennsylvania ex rel Billman* v. *Burke*, 170 F. 2d 413 (C. A. 3); *United States ex rel. Marelia* v. *Burke*, 101 F. Supp. 615 (E. D. Pa.). The denial of certiorari by this Court following such review, while entitled to weight, is no conclusive or decisive bar to this proceeding. *Darr* v. *Burford*, *supra*; *Coggins* v. *O'Brien*, 188 F. 2d 130 (C. A. 1); *Goodman* v. *Lainson*, 182 F. 2d 814 (C. A. 8); *Anderson* v. *Eidson*, 191 F. 2d 989 (C. A. 8); see also pages 48-50 *supra*.

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the evidence submitted by petitioners. The subsequent position of the District Court was based mainly on the observation by the North Carolina Supreme Court, when granting the motion of the Attorney General of North Carolina to docket the case and dismiss the appeal, that: "We have carefully examined the record filed in this case and find no error therein" (*State* v. *Daniels*, 231 N.C. 509, 57 S.E. 2d 653). It will be noted that this observation stands by itself and is unsupported by any opinion or discussion either of the facts or of the law pertaining to the jury and confessions questions raised upon the prosecution. Moreover, the foregoing observation was not based upon any briefs submitted by either of the parties on the merits nor was it rendered after oral argument—formal or otherwise—on the merits. Indeed, it is dubious whether there was available to the Supreme Court of North Carolina a transcript of the testimony of the criminal trial at the time it acted upon the motion to docket and dismiss the appeal. Quite clearly, under the foregoing circumstances, the North Carolina Supreme Court never inquired fully into the merits of the grave constitutional questions raised upon the prosecution. Cf. *Williams* v. *Kaiser*, 323 U.S. 471, 477; *House* v. *Mayo*, 324 U.S. 42. And the observation so heavily relied upon by the District Court can only be construed as referring to the judgment roll which was before the court at the time that it acted upon the State's motion to docket and dismiss the appeal. It was that judgment roll which, in all likelihood, constituted "the record" to which the North Carolina Supreme Court had reference in the foregoing opinion.

If, however, no review on the merits was evoked by petitioners in the North Carolina Supreme Court, and if, as respondent concedes, petitioners are without further state remedy, the question arises whether petitioners' delay of one day in perfecting their state appeals worked an irrevocable and complete forfeiture of the right to complain of and obtain relief for the gross constitutional errors in the processes by which the State of North Carolina proposes to take the lives of the petitioners. We have found no case, at least in this Court, which sanctions such a disregard for the high humane purposes of the Great Writ.

Were this a federal prosecution, there would be ample explicit authority to repudiate any such forfeiture doctrine. Of course, the litigant who purposefully foregoes his right to appeal and elects to proceed by habeas corpus for reasons of some supposed procedural advantage will properly be confronted with the requirements of orderly judicial administration as a bar to the proceeding. *E.g., Craig* v. *Hecht*, 263 U. S. 255; see also *In re Lincoln*, 202 U. S. 178, 182, 183. On the other hand, the litigant who did not appeal because he was not accorded his constitutional right to counsel, an agency frequently necessary to the prompt processing of an appeal, is for that reason accorded rather than denied habeas corpus relief (*e.g., Johnson* v. *Zerbst*, 304 U. S. 458; *Waley* v. *Johnston, supra*), as is the litigant who otherwise cannot, for good cause, effectively avail himself of his right to appeal (*Adams* v. *United States*, 317 U. S. 269, 274). But where the effect of a failure to appeal is not determined by whether it was due to a matter of deliberate choice or to circumstances which effectively deprived the litigant of a choice, then, in the review of federal convictions, the effect of such failure is determined by whether the petitioner raises the kind of questions appropriate for habeas corpus jurisdiction. For in the review of federal convictions, as in the review of state convictions,

habeas corpus jurisdiction depends on the commission of "jurisdictional and constitutional errors at the trial, without limit of time (*United States* v. *Smith*, 331 U. S. 469, 475); the "deprivation of . . . basic and fundamental procedural safeguards, . . . procedural irregularities of such a nature or magnitude as to render the hearing unfair" (*Eagles* v. *United States*, 329 U. S. 304, 312); a finding "that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied" (*Bowen* v. *Johnston*, 306 U. S. 19, 24). Accordingly, in numerous instances habeas corpus review of federal convictions was granted, despite the failure of the petitioner to exhaust his appellate remedy, where such basic error was raised. *Bowen* v. *Johnston*, *supra*; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Matter of Gregory*, 219 U. S. 210; *In re Heff*, 197 U. S. 488; *Ex parte Hudgings*, 249 U. S. 378; *Manning* v. *Biddle*, 14 F. 2d 518 (C. A. 8); cf. *Ex parte Baine*, 121 U. S. 1; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417. In those cases where failure to appeal a federal conviction was held a bar to habeas corpus, it appears most clearly that questions not cognizant upon habeas corpus were raised; as to such matter, which could be raised *only* by appeal, the failure to appeal was decisive—not because of the failure, but because of the matter raised. *Riddle* v. *Dyche*, 262 U. S. 333; *Harlan* v. *McGourin*, 218 U. S. 442; *Eagles* v. *United States*, *supra*; *Sunal* v. *Large*, 332 U. S. 174; *Craig* v. *Hecht*, *supra*; *United States* v. *Valente*, 264 U. S. 563. In *Sunal* v. *Large* the Court made explicit the proposition that failure to appeal affects habeas corpus jurisdiction only "where the error does not trench on any constitutional rights" (332 U. S., at 182); the Court suggested that it intended to affirm rather than to disturb the doctrine of those cases which granted the writ, irrespective of prior appeal, where

"the trial or sentence by a federal court violated specific constitutional guaranties (*id.*, at 178-179).

We do not think that a different result follows in the review of a state conviction. Of course, such a conviction brings into play considerations of comity. But they do not warrant the conclusion for which respondent here presses. "Rules of comity or convenience must give way to constitutional rights." HOLMES, J., in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. Comity is founded on that deference owed to the states which requires federal abstention from action while the state processes are still not at an end. *Darr* v. *Burford*, 339 U. S. 200, 204; *Wade* v. *Mayo*, 334 U. S. 672, 680; *Frank* v. *Mangum*, 237 U. S. 309, 328. Where, as here, those processes are, as we are informed by the courts of North Carolina, at an end, comity no longer bars federal habeas corpus review. Comity does not further require enforcement in the federal courts of the state judgment that because of an alleged failure to exhaust a state remedy no longer available, basic federal constitutional rights are forfeit. *United States ex rel Rooney* v. *Ragen*, 158 F. 2d 346, 352, 353 (C.A. 7), *cert. den.* 331 U. S. 842. The exhaustion requirement has always been considered not an expression of a lack of federal power, but an exercise of federal discretion. *Ex parte Royall*, 117 U. S. 241; compare Report of Judicial Conference of Senior Circuit Judges (1943) 23, with Report of Judicial Conference of Senior Circuit Judges (1947) 18 and 28 U. S. C. A. § 2254.[21a] Whatever harsh inequities might necessarily evolve from a lack of jurisdiction, it is clear that here the weight to be accorded to the considerations of comity above-mentioned rests in the discretion of this Court—a discretion which, we submit, is not required by reason or authority to be so

[21a] The statute proposed in the earlier Report would, as compared with that later proposed and adopted, have deprived the federal courts of habeas corpus jurisdiction where state remedies had not been exhausted.

exercised as to work a forfeiture of human life. *Jones* v. *Kentucky*, 97 F. 2d 335, 336, 338.

It is well settled that the failure to exhaust a state remedy is not an automatic, mechanical bar to federal habeas corpus. Thus, of course, if the remedy is, by its nature, inadequate, then by the terms of § 2254, it need not be exhausted. Similarly, if because of the interference by state officials with his right to appeal or for other excusable cause the petitioner fails to exhaust a state remedy, he may still gain access to federal habeas corpus. *Jennings* v. *Illinois*, 342 U. S. 104; *Dowd* v. *United States ex rel Cook*, 340 U. S. 206; *Williams* v. *Kaiser*, 323 U. S. 471; *Smith* v. *O'Grady*, 312 U. S. 329. This case could rest on the foregoing authority for the reason that the failure to complete the appeal was for cause as valid as that which obtained in the cited cases. The disallowance of the appeal by the North Carolina courts, was so unreasonable and arbitrary as to violate the constitutional guarantee of equal protection of law (see pp. 34-36 *supra*); in such circumstances, the failure to exhaust the appeal—if failure there was—is no bar. And were that disallowance less than unconstitutional, still, this Court may determine for itself whether the circumstances surrounding the late perfecting of the appeal by petitioners justified or excused the delay, or were such as to cause a "waiver" of the right to urge federal constitutional rights. *Davis* v. *O'Hara*, 266 U. S. 314; *Parker* v. *Illinois*, 333 U. S. 571. We think that the facts fail to sustain any waiver, but, to the contrary, establish good cause. Proof of waiver, where fundamental constitutional rights are involved, must be clear and unequivocal. *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 465. Here petitioners did not knowingly and deliberately follow a course which would foreclose the assertion of constitutional rights. *Glasgow* v. *Moyer*, 225 U. S. 420, 429-430; *Parker* v. *Illinois*, *supra*. Nor did petitioners purposely decide to forego an

appeal, and then, as an afterthought, proceed by habeas corpus when the time to appeal had expired. *United States ex rel. Hanson* v. *Ragen*, 166 F. 2d 608 (C.A. 7), *cert. den.* 334 U. S. 849. Here every act of petitioners negatived any intent to abandon, forego, or waive their right to appeal. The appeal was not available only for good reasons inconsistent with any purpose of waiver. For purposes of this proceeding, irrespective of the constitutionality of the North Carolina Supreme Court disallowance of the appeal, it should be found that petitioners did not, by their failure to perfect their appeal, waive the constitutional rights here asserted; that such failure stemmed from good and sufficient reasons; and that appeal to the North Carolina Supreme Court may, therefore, be treated as exhausted, non-available, or inadequate in this case within the meaning of § 2254.

Moreover, as we read the decisions in this Court, absent proof of an affirmative waiver, the failure to exhaust the appeal is here no bar apart from proof of sufficient cause for such failure. For this purpose we put to one side, as inapplicable, those cases where federal review was sought prior to conviction in the absence of special exigencies. *New York* v. *Eno*, 155 U. S. 89; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284. Similarly inapplicable are those cases where review was sought, after failure to appeal or to pursue a writ of error to this Court, as to matter not properly the subject of review by habeas corpus at any time and reviewable, if at all, only by such appeal or writ of error. *Goto* v. *Lane*, 265 U. S. 393; *Ashe* v. *United States ex rel. Valotta*, 270 U. S. 424; *Kohl* v. *Lehlback*, 160 U. S. 293; *Moreti* v. *Massachusetts*, 183 U. S. 138; *Crossley* v. *California*, 168 U. S. 640; *Valentina* v. *Mercer*, 201 U. S. 131; *Knewel* v. *Egan*, 268 U. S. 442, 445-6; *Andrews* v. *Swartz*, 159 U. S. 272; *In re Wood*, 140 U. S. 278; *Kaizo* v. *Henry*, 211 U. S. 146. And

the question here considered is likewise not determined by those cases wherein questions cognizant in a habeas corpus proceeding are raised but not decided for failure to sue by writ of error to this Court. *Ex parte Royall*, 117 U. S. 241; *Matter of Spencer*, 228 U. S. 652; *Tinsley* v. *Anderson*, 171 U. S. 101; *Reid* v. *Jones*, 187 U. S. 153; *Urquhart* v. *Brown*, 205 U. S. 179; *Markuson* v. *Boucher*, 175 U. S. 184. For from 1789 to 1872 the time to sue out such a writ was five years from date of judgment (see, *e.g. Brooks* v. *Norris*, 11 Howard (U. S.) 204); and from the Act of June 1, 1872, c. 255 § 2 (17 Stat. 196) to the Act of September 6, 1916, § 6 (39 Stat. 729), the time period was two years (*Allen* v. *Southern Pac. R. Co.*, 173 U. S. 479; *Cummings* v. *Jones*, 104 U. S. 449). For this reason, it appeared clearly from some of the foregoing cases (*Urquhart* v. *Brown*, *supra*, at 183; *Markuson* v. *Boucher*, *supra*, at 187; see also *Tinsley* v. *Anderson*, *supra*; *Reid* v. *Jones*, *supra*) that when the Court denied the writ of habeas corpus time still remained to proceed by writ of error.

Passing the foregoing cases as inapplicable, therefore, we note first those where, without notice or comment by the Court, failure to exhaust a state remedy or writ of error was no bar to a granting of the writ or consideration of the questions raised on the merits. *Matter of Moran*, 203 U. S. 96; *Minnesota* v. *Barber*, 136 U. S. 313; *Rogers* v. *Peck*, 199 U. S. 425; cf. *Ex parte Hull*, 312 U. S. 546. Similarly suggestive of the availability of federal review of fundamental federal questions, without regard to whether state remedies have been exhausted, is *Brown* v. *Mississippi*, 297 U. S. 278, 286-287, where the Court deemed irrelevant the failure on the trial to raise objection to error which renders the entire proceedings void. And while the Court has referred to considerations of orderly administration of justice in the state courts, a factor which might require,

at the risk of forfeiture, perfecting of an appeal (*Matter of Spencer*, 228 U. S. 652, 659-661), it has never held that, absent a clear waiver, federal habeas corpus is not proper to review fundamental constitutional questions when no state remedy is any longer available. See Note, 40 *Columbia Law Rev.* 535, 537; 34 *Minnesota Law Rev.* 653, 658; 61 *Harvard Law Rev.* 657, 666. To the contrary, although the question was raised but not passed on in *Wade* v. *Mayo*, 334 U. S. 672, it was said in *Mooney* v. *Holohan*, 294 U. S. 103, 115, that the exhaustion requirement extended "to whatever judicial remedy afforded by the State may still remain open"; constitutional questions raised were reviewed on the merits in *Ashe* v. *United States ex rel Valotta*, 270 U. S. 424, although no writ of error was sought from the state conviction; and it was indicated in *Woods* v. *Nierstheimer*, 328 U. S. 211, 217, that if no state relief is available by means of a state remedial route which petitioner had apparently allowed to lapse, and the petitioner claimed he was imprisoned in violation of the Constitution of the United States, ". . . the federal courts would be available to provide a remedy to correct such wrongs." See *United States ex rel Rooney* v. *Ragen*, 158 F. 2d 346, 352, *cert. den.* 331 U. S. 842. These views are in accord with the basic notion that habeas corpus is the appropriate instrument where, but for the writ, the petitioner would be remediless. *House* v. *Mayo*, 324 U. S. 42, 46; *Ex parte Hawk*, 321 U. S. 114, 118; *Waley* v. *Johnston*, 316 U. S. 101. As the Court said when urged to dismiss a petition because of the petitioner's failure to exhaust a federal appeal:

> ". . . it necessarily follows that no legal procedural remedy is available to grant relief for violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*. Of the contention that the law provides no effective remedy for such a depriva-

> tion of rights affecting life and liberty, it may well be said . . . that it 'falls with the premise.'" *Johnson* v. *Zerbst*, 304 U.S. 458, 467.

We conclude, similarly, that where, as here: (1) fundamental constitutional questions are raised; (2) no state remedies are now available; and (3) those remedies not exhausted, and no longer available, were not affirmatively waived by petitioners,[22] the requirements of § 2254 have been satisfied and relief in federal habeas corpus may be had. Reason, common sense, and humanity dictate this conclusion; discretion to defer to such dictates exists; and no decision of this Court is to the contrary. The Great Writ should be maintained as the ultimate recourse of those who are subjected to loss of life or liberty without the due process of the law. For this purpose, it must remain as elastic and flexible as the demands of equity require. Its proper applicability to the case at bar has been recognized in a precisely analogous case. *United States ex rel Auld* v. *New Jersey*, 187 F. 2d 615 (C.A. 3); see also *Thomas* v. *Duffy*, 191 F. 2d 360 (C.A. 9); *Bacom* v. *Sullivan*, 194 F. 2d 166 (C.A. 5); *Ekberg* v. *McGee*, 194 F. 2d 178 (C.A. 9); *United States ex rel. White* v. *Walsh*, 174 F. 2d 79 (C.A. 7); *Spence* v. *Dowd*, 145 F. 2d 431 (C.A. 7). The writ should here be allowed so that petitioners may have their innocence or guilt of the ultimate charge, for which they are now detained, determined by the fair trial vouchsafed in such cases by the Constitution.

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[22] Of course, the limited scope of habeas corpus review, as compared with an appeal, will effectively deter convicted defendants from foregoing an appeal and proceeding by habeas corpus. See 40 *Columbia Law Rev.* 535, 539; 97 *Univ. of Pennsylvania Law Rev.* 285, 287; 34 *Minnesota Law Rev.* 653, 659.

Conclusion

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review its judgment and that upon such review the judgment be reversed.

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